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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 CONSUMERTRACK, INC., a
California corporation,

13 Plaintiff,

14 v.

15 ADVERTISING DIRECT, LLC d/b/a
16 BLUE C ADS, a Florida limited liability
17 company, and DOES 1-10,

18 Defendants.

Case No. 2:17-cv-02404 PA(FFMx)

19 **PLAINTIFF**
20 **CONSUMERTRACK, INC.'S**
21 **APPLICATION FOR DEFAULT**
22 **JUDGMENT**

23 Plaintiff ConsumerTrack, Inc. respectfully moves for entry of an order of
24 default judgement against Defendants Ad Partners, LLC and Blue Ocean Ads, LLC
25 pursuant to Fed. R. Civ. P. 55(b)(2).

26 On May 8, 2017, Plaintiff ConsumerTrack, Inc. filed a Second Amended
27 Complaint against Defendants Ad Partners, LLC, Blue Ocean Ads, LLC, and Offer
28 Conversion, LLC. Dkt. No. 17.

On May 11, 2017, Defendant Ad Partners, LLC was served with the Second
Amended Complaint and a proof of service was filed with the Court. Dkt. No. 26.

1 On May 19, 2017, Defendant Blue Ocean Ads, LLC was served with the
2 Second Amended Complaint and a proof of service was filed with the Court. Dkt.
3 No. 27.

4 Defendants Ad Partners, LLC and Blue Ocean Ads, LLC both failed to
5 answer or otherwise respond to the Second Amended Complaint and both failed to
6 make an appearance in this case.

7 Plaintiff requested and the Clerk entered default against Defendants Ad
8 Partners, LLC and Blue Ocean Ads, LLC on June 27, 2017 pursuant to Fed. R. Civ.
9 P. 55(a). (Dkt. 32.)

10 Declarations satisfying Rule 55 and detailing the facts related to the default
11 request were filed with the Court on June 23, 2017. (Dkt. 29 and 30.)

12 Default judgment against Defendants under Rule 55(b) is now reasonable and
13 appropriate.

14 In determining whether to grant a default judgment, courts consider: (1) the
15 possibility of prejudice; (2) the merits of the claims; (3) the sufficiency of the
16 complaint; (4) the money at stake; (5) the possibility of a dispute concerning
17 material facts; (6) whether default was due to excusable neglect; and (7) the policy
18 favoring decision on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir.
19 1986). “[T]he factual allegations of the complaint, except those relating to the
20 amount of damages, will be taken as true.” *Geddes v. United Fin. Group*, 559 F. 2d
21 557, 560 (9th Cir. 1977).

22 With respect to the first *Eitel* factor, Plaintiff will be prejudiced if judgment is
23 not entered. As pled in the Second Amended Complaint, Defendants owe Plaintiff
24 indemnity with regards to allegations and legal action taken by Utah-based internet
25 service provider, XMission, L.C., who sued ConsumerTrack for alleged violations
26 of the CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq., related to emails
27 allegedly sent by Defendants. ConsumerTrack denies the allegations of liability
28 related to the XMission lawsuit, but nonetheless is incurring fees and expenses

1 related to the XMission lawsuit and is exposed to potential liability from the
2 affiliate emails. (Dkt. 17 ¶ 5.) Declaring that Plaintiff is owed indemnity and that
3 the Defendants breached their contractual obligations by failing to provide the
4 required indemnity is needed or Plaintiff will be substantially prejudiced.

5 Plaintiff's Motion also clearly satisfies the second and third *Eitel* factors;
6 Plaintiff has adequately stated and supported its claims against Defendants. As
7 detailed in the Second Amended Complaint, the Defendants each owe
8 ConsumerTrack an indemnity obligation with respect to the XMission lawsuit and
9 allegations therein, including but not limited to indemnity for ConsumerTrack's
10 defense costs and potential damages and other remedies related to the XMission
11 lawsuit and XMission's allegations. (Dkt. 17 ¶ 6.) ConsumerTrack's affiliate
12 agreements have indemnification provisions that require the affiliate to indemnify
13 and hold harmless Plaintiff against any and all justifiable liability, claims, suits,
14 losses, costs and legal fees caused by, arising out of, or otherwise resulting from any
15 act, whether intentional or negligent, or omission of the affiliate, in the
16 performance and/or failure to perform the obligations and honor the
17 representations and warranties agreed to between the affiliate and Plaintiff. (Dkt. 17
18 ¶ 7.) The affiliate agreement further provides that the affiliate shall at all times
19 comply with all applicable laws, regulations and any other applicable controlling
20 authority. Defendants have failed to meet their obligations under the affiliate
21 agreements.

22 Plaintiff also satisfies the fourth *Eitel* factor. Plaintiff seeks declaratory relief
23 only in the form of a Court judgment that states the following:

- 24 • That the Court enter a Declaratory Judgment that Defendants Ad
25 Partners, LLC and Blue Ocean Ads, LLC must each indemnify and
26 hold harmless ConsumerTrack for all losses, costs, and legal fees
27 associated with the XMission lawsuit and XMission's allegations
28 therein.

- That the Court enter a Declaratory Judgment that Defendants Ad Partners, LLC and Blue Ocean Ads, LLC each breached its contract with ConsumerTrack by failing to provide the requisite indemnity.

With regard to the fifth *Eitel* factor, there is no apparent dispute concerning the material facts of the case. Defendants have failed to appear in the action, and because default has been entered, all well-pleaded allegations in the Second Amended Complaint, except those relating to damages, are assumed to be true. *Discovery Commc'ns, Inc. v. Animal Planet, Inc.*, 172 F. Supp. 1282, 1288 (C.D. Cal. 2001). Plaintiff's requested default judgment includes only declaratory relief.

The sixth *Eitel* factor is also satisfied: default here has not occurred as a result of defendant's excusable neglect. Defendants were each served with the Second Amended Complaint and failed to appear or defend this case. The Clerk entered it into default prior to the filing of the present Motion, and Defendants still have failed to defend this action. Thus, if the Court grants Plaintiff's Motion and entered a default judgment against Defendants, it did not occur as a result of excusable neglect.

Finally, the seventh *Eitel* factor is also satisfied. Federal courts prefer to decide cases on their merits when "reasonably possible." *Eitel*, 782 F.2d at 1472. However, when a defendant failed to answer a plaintiff's complaint, a decision on the merits is "impractical, if not impossible." *PepsiCo, Inc. v. Cal. Sec. Cans*, 283 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Therefore, "the preference to decide cases on the merits does not preclude a court from granting default judgment." *Kloepping v. Fireman's Fund*, No. C 94-2684, 1996 U.S. Dist. LEXIS 1786, at *10 (N.D. Cal. Feb. 13 1996). The Court, therefore, may enter default judgment against Defendants.

Plaintiff therefore requests that the Court enter default judgment against Defendants.

1 Dated: August 8, 2017

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